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**pro hac vice motions forthcoming*

Attorneys for Plaintiff Robert Anthony Zaragoza

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Robert Anthony Zaragoza

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, a
Delaware Corporation,

Defendant.

Case No.

COMPLAINT FOR DAMAGES

JURY TRIAL DEMANDED

EP21 CV0287

Plaintiff Robert Anthony Zaragoza ("Zaragoza") files this Complaint against Defendant Union Pacific Railroad Co. ("Union Pacific" or "Defendant") for damages resulting from its violation of the Americans with Disabilities Act, 42 U.S.C § 12101 *et seq.*, as amended ("ADA").

PRELIMINARY STATEMENT

1. Union Pacific enforces a company-wide fitness-for-duty program ("Fitness-for-Duty"), through which the company imposes a blanket policy automatically removing from service employees who disclose or who Union Pacific suspects have certain health conditions. Union Pacific then subjects employees whom it removes from service to a Fitness-for-Duty evaluation.

1 Union Pacific applies this policy regardless of whether the employee has been safely performing
2 the essential functions of their job. Union Pacific evaluations do not assess whether an employee
3 is capable of safely or effectively performing their work.

4 2. Employees responsible for train movement must be certified by the Federal
5 Railroad Administration (“FRA”). The FRA allows railroads to certify employees through one of
6 twelve color-vision examinations, including the *Ishihara* test, which consists of a number of
7 colored plates, each containing a circle of dots appearing randomized in color and size, that form
8 a number or shape clearly visible to those without color-vision deficiency, and invisible, or
9 difficult to see, to those who are color-blind or who have color-vision deficiency.¹ Because
10 employees who have color-vision deficiency may nevertheless be able to distinguish between
11 colors, the FRA permits them to be certified through a color-vision field test (“CVFT”). Even
12 employees who the employer deems to have not met the employer’s requirement to pass a CVFT
13 may be certified and the employee allowed to work when there is reason to believe that they can
14 perform their job’s essential functions.

15 3. Because employees responsible for train movement must be certified, Union
16 Pacific’s Fitness-for-Duty includes color-vision testing. In or around April of 2016, Union Pacific
17 replaced its CVFT with a new test – the “Light Cannon” test. The old CVFT used existing train
18 signal masts with actual wayside lights and lenses next to the tracks along the Right of Way or
19 within the railyards; whereas the Light Cannon test uses a mobile light device that Union Pacific
20 developed in-house. The Light Cannon test does not replicate what employees see in the field, and
21 yet the majority of those who have been subjected to it fail, despite having successfully passed the
22 old CVFT and performed their jobs without missing a signal for years or even decades.

23 4. In February 2016, several Union Pacific employees commenced a class action
24 disability discrimination lawsuit against Union Pacific, alleging that Union Pacific’s Fitness-for-

26 ¹ Color-vision deficiency is the inability to distinguish certain color shades under normal lighting
27 condition; whereas, color blindness is the inability to see colors. Color-vision deficiency is
28 relatively common, e.g., one in twelve men suffer from red-green color vision deficiency. And
unlike color blindness, color-vision deficiency does not prevent its sufferers from performing
tasks that require them to distinguish between colors.

1 Duty policies and practices constituted a pattern and practice of discrimination under the ADA.
2 *See Quinton Harris et. al. v. Union Pacific Railroad Company*, Case No. 8:16-cv-381 (D. Neb.).
3 The *Harris*-plaintiff's allegations "clearly encompass vision testing as it is included in the FFD
4 program." *Harris*, 2019 U.S. Dist. LEXIS 16113, at *10-11 (D. Neb. Feb 1, 2019).

5 5. Zaragoza is a victim of the same discriminatory Fitness-for-Duty policies and
6 practices alleged in *Harris*. Despite each being qualified and safely performing his job without
7 incident, Zaragoza was removed from service for a Fitness-for-Duty evaluation and excluded from
8 work at Union Pacific on the basis of his real or perceived disability, which regards his ability to
9 see color. Zaragoza was a putative class member in *Harris*, and now timely brings this action.

10 JURISDICTION AND VENUE

11 6. This action arises under the Federal Americans with Disabilities Act, 42 U.S.C.
12 §§ 12101 *et seq.* As such, this Court has jurisdiction under 28 U.S.C. § 1331.

13 7. Venue is proper under 28 § 1391(b)(2), because a substantial part of the events or
14 omissions that give rise to this lawsuit occurred in the Western District of Texas.

15 8. Venue is proper under 42 U.S.C. § 2000e-5(f)(3) because a substantial part of the
16 alleged unlawful practices were committed by Union Pacific in the Western District of Texas and
17 because, but for the unlawful practices of Union Pacific, Zaragoza would have worked in the
18 Western District of Texas.

19 THE PARTIES

20 9. Zaragoza resides in El Paso, Texas. Zaragoza is an individual with a disability, as
21 that term is defined under the ADA, who, at all times material to this lawsuit, was employed by
22 Union Pacific in the State of Texas.

23 10. Union Pacific is a railroad carrier engaged in interstate commerce.

24 PROCEDURAL PREREQUISITES AND TIMELY FILING

25 11. On February 19, 2016, counsel for Zaragoza, on behalf of six named plaintiffs and
26 those similarly situated, filed a First Amended Complaint against Union Pacific in the Western
27 District of Washington, alleging disability discrimination in violation of the ADA, along with state
28 law. The case was thereafter transferred to the District of Nebraska. *See Quinton Harris et al. v.*

1 *Union Pacific Railroad Company*, Case No. 8:16-cv-381 (D. Neb.).

2 12. Zaragoza was a putative class member in the *Harris* case and Zaragoza's claim
3 under the ADA were subject to tolling during the pendency of litigating the class-wide claims,
4 pursuant to the Supreme Court's ruling in *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345
5 (1983).

6 13. The *Harris* court certified the class action in February 2019; however, the Eighth
7 Circuit Court of Appeals reversed the certification decision on March 24, 2020.

8 14. As a result of *Crown Cork* tolling, Zaragoza had three-hundred (300) days from the
9 date of the Eighth Circuit's order to file a Charge of Discrimination with the Equal Employment
10 Opportunity Commission, "EEOC." Shortly after the Eighth Circuit issued its order reversing class
11 certification, the parties entered into a tolling agreement, extending the time for Zaragoza and other
12 putative class members to file EEOC charges by an additional sixty (60) days.

13 15. Zaragoza timely filed a Charge of Discrimination with the EEOC on March 8, 2020.
14 The EEOC issued a determination on October 25, 2021, requiring that Zaragoza file a complaint
15 in court by January 23, 2022.

16 16. Zaragoza timely brings the present action.

17 **FACTUAL ALLEGATIONS**

18 ***UNION PACIFIC'S FITNESS-FOR-DUTY POLICIES AND PRACTICES***

19 17. Union Pacific's Medical Rules outline its Fitness-for-Duty program. The rules
20 require that certain employees, including all employees in Operating Department field positions
21 (such as Transportation, Engineering Services and Mechanical positions), undergo a Fitness-for-
22 Duty evaluation where they report or Union Pacific suspects that they have one of an enumerated
23 list of medical and/or physical conditions.

24 18. When a Fitness-for-Duty evaluation is triggered, the employee is removed from
25 work without pay while Union Pacific Health and Medical Services completes the evaluation and
26 until Union Pacific informs the employee's supervisor that the employee has been cleared to return
27 to work.

28 19. Union Pacific Fitness-for-Duty includes color-vision testing. Suspected color-

1 vision deficiency triggers a Fitness-for-Duty evaluation.

2 20. FRA regulation requires that all locomotive engineers and conductors undergo
3 periodic certification. Under the fitness requirement, an engineer or conductor must have the
4 ability to recognize and distinguish between the colors of railroad signals, as demonstrated through
5 one of twelve forms of color-vision examination. Where an employee fails one of the listed
6 examinations, FRA regulations state that an engineer or conductor may nonetheless be certified
7 through a CVFT or where there is otherwise reason to believe that they can recognize and
8 distinguish between colors of railroad signals.

9 21. Union Pacific utilizes the 14-Plate Ishihara test to test for color-vision deficiency
10 for FRA certification. When an employee fails the Ishihara test, Union Pacific subjects the
11 employee, as part of the Fitness-for-Duty process, to a CVFT implemented in or around April
12 2016, called the Light Cannon test.

13 22. The Light Cannon Test does not simulate real world conditions and does not assess
14 the employee's ability to recognize and distinguish between colors of railroad signals.

15 23. As a result of the conduct described above, Union Pacific employees who have
16 never had a problem performing the essential functions of their jobs have been removed from work
17 without pay either for an extended period or indefinitely.

18 ***PLAINTIFF ROBERT ANTHONY ZARAGOZA***

19 24. Zaragoza was hired by Union Pacific in Texas in November 2006 and worked as a
20 conductor and brakeman until approximately April 2016, when he was removed from service.

21 25. As a conductor and brakeman, part of Zaragoza's job entailed reading and
22 interpreting multicolored railroad traffic signal lights on signal masts. Zaragoza safely worked as
23 for Union Pacific for over seven years without misreading a signal.

24 26. In 2006 Union Pacific administered Zaragoza an Ishihara color vision test as a part
25 of his post-hiring physical examination. Zaragoza passed the Ishihara test and was allowed to work
26 as a conductor.

27 27. Between 2006 and 2016, Zaragoza took the Ishihara test several more times as part
28 of his FRA conductor certification, and, on at least on occasion, he was adjudged to have failed

1 the test. After failing the Ishihara test, Zaragoza took and passed a previous Union Pacific CVFT
2 in which he read and relayed a series of signals from a real railroad signal mast to assess his ability
3 to read and interpret signals in the field.

4 28. On or about April 8, 2016, Zaragoza went to recertify as a conductor. He took and
5 failed the Ishihara Test. On this occasion his test results triggered a Fitness-for-Duty evaluation
6 and Union Pacific removed Zaragoza from work as a conductor.

7 29. On or about April 16, 2016, as part of the Fitness-for-Duty process, Union Pacific
8 administered the newly adopted Light Cannon test instead of the old CVFT. Union Pacific
9 concluded that Zaragoza failed the Light Cannon test.

10 30. On or about May 2, 2016, Union Pacific issued Zaragoza permanent work
11 restrictions prohibiting him from working in any position requiring accurate identification of
12 colored railroad wayside signals, including as a conductor. Union Pacific claimed that these
13 restrictions could not be accommodated.

14 31. On or about May 2, 2016, Zaragoza underwent a 14-plate Ishihara color vision test,
15 administered by Dr. Louis McMahon of Eye World Optometrists. Zaragoza passed the clinical test
16 with normal Ishihara results.

17 32. On or about May 4, 2016, Zaragoza was approved for a commercial driver's license
18 by Dr. Fernando Aviles, M.D. As a part of the assessment, Dr. Aviles certified that Zaragoza was
19 able to "recognize and distinguish among traffic control signals and devices showing red, green,
20 and amber colors."

21 33. After being removed from service, Zaragoza appealed his denial of FRA
22 certification under the Light Cannon test and requested that he be allowed to retake a CVFT. On
23 or about August 22, 2016, Union Pacific sent Zaragoza to ophthalmologist Dr. David Schechter,
24 MD, for additional vision testing. On April 17, 2016, Union Pacific sent Dr. Schechter a referral
25 letter concerning Zaragoza, in which it informed Dr. Schechter that Union Pacific was "not asking
26 you to provide an opinion on whether Mr. Zaragoza has a color vision deficiency, or if he has
27 adequate color vision to work as a railroad conductor, since [Union Pacific has] already established
28 this based on his failure of the Color Vision Field Test . . ." Dr. Schechter assessed Zaragoza using

1 the Farnsworth D-15 color test and, on or about September 6, 2016, Dr. Schechter informed Union
2 Pacific that Zaragoza's results were "normal."

3 34. On or about October 11, 2016, Union Pacific denied Zaragoza's appeal and refused
4 to allow him to retake a CVFT.

5 35. In the time since removing him from service, Union Pacific has persisted in its
6 refusal to allow Zaragoza to return to his job as a conductor/brakeman. At all times, Zaragoza was
7 capable of performing the essential functions of his job, and he remains able to perform them
8 today.

9 36. After being removed from service, Zaragoza contacted Union Pacific on one or
10 more occasions, including a contacting a Union Pacific return to work manager in Fort Worth, to
11 request that he be allowed to return to work in a different craft or position.

12 37. Since being held out of service by Union Pacific, Zaragoza has maintained his
13 commercial driver's license in order to work as a truck driver, and, as a result, has undergone and
14 passed periodic color vision testing.

15 38. On information and belief, Union Pacific had and/or has one or more open jobs in
16 which Zaragoza could be returned to work despite the permanent work restrictions issued by Union
17 Pacific.

18 39. To the extent that Zaragoza needed reasonable accommodation, Union Pacific
19 failed to provide them, and failed to even engage in an interactive process regarding what
20 accommodations were possible.

21 40. Zaragoza remains a Union Pacific employee on an indefinite medical leave of
22 absence under the Union Pacific Fitness-for-Duty policy. To the extent that Zaragoza needed
23 reasonable accommodation, Union Pacific has and continues to fail to provide Zaragoza with a
24 reasonable accommodation or to engage in an interactive process regarding what accommodations
25 were possible.

26 ///

CAUSES OF ACTION

**COUNT I
VIOLATION OF THE ADA
DISABILITY DISCRIMINATION – DISPARATE TREATMENT**

41. Plaintiff incorporates the foregoing paragraphs by reference.

42. The ADA defines a disability as (A) a physical or mental impairment that impairs one or more major life activities; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(1). An individual is regarded as having such an impairment if they are subjected to an action prohibited under the ADA “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C. § 12102(1)(C).

43. At all relevant times, Union Pacific regarded Zaragoza as having an impairment and, therefore, Zaragoza was an individual with a disability under the ADA.

44. At all relevant times, Zaragoza had the requisite skill, experience, education, and other job-related requirements of his positions, and was therefore a qualified individual under the ADA.

45. At all relevant times, Zaragoza could perform the essential functions of his position, with or without reasonable accommodation.

46. Section 12112(a) of the ADA prohibits employers from “discriminat[ing] against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”

47. Discriminating against a qualified individual on the basis of disability under Section 12112(a) includes, among other things, “using qualification standards, employment tests or other selection criteria that screen out . . . an individual with a disability . . . unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position and is consistent with business necessity.” 42 U.S.C. § 12112(b)(6).

48. Union Pacific discriminated against Zaragoza on the basis of a real or perceived disability in one or more of the following ways:

- a. Removing Zaragoza from service and issuing work restrictions on the basis of his disability;
- b. Failing to utilize alternate clinical tests to the Ishihara Test to determine whether Zaragoza can effectively read and interpret railroad signals;
- c. Using a field test that does not assess whether Zaragoza can effectively read and interpret railroad signals;
- d. Failing to otherwise assess whether Zaragoza is capable of reading and interpreting railroad signals; and
- e. Using a Fitness-for-Duty evaluation process that screens out qualified individuals with disabilities.

49. Because Union Pacific violated 42 U.S.C. § 12112, Zaragoza has suffered and will continue to suffer loss of income, emotional distress, and other damages in an amount in excess of \$75,000. Zaragoza is also entitled to attorneys' fees and costs incurred in connection with these claims.

50. Union Pacific committed the above-alleged acts with reckless disregard or deliberate disregard for Zaragoza's rights and safety. As a result, Zaragoza is entitled to punitive damages.

COUNT II
VIOLATION OF THE ADA
DISABILITY DISCRIMINATION – DISPARATE IMPACT

51. Plaintiff incorporates the foregoing paragraphs by reference.

52. Zaragoza is a qualified individual with a disability within the meaning of the ADA.

53. Discriminating against a qualified individual on the basis of disability includes "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity[.]" 42 U.S.C. § 12112(b)(6).

54. Discriminating against a qualified individual on the basis of disability also includes "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination

1 on the basis of disability.” 42 U.S.C. § 12112(b)(3).

2 55. Union Pacific discriminated against Zaragoza on the basis of disability in one or
3 more of the following ways:

4 a. Union Pacific’s Fitness-for-Duty policies, including its use of the Light Cannon
5 test, disproportionately and adversely impact qualified individuals with disabilities;

6 b. Union Pacific uses qualification standards that screen out or tend to screen out
7 qualified individuals with disabilities; and

8 c. Union Pacific uses a Fitness-for-Duty evaluation process that screens out or tends
9 to screen out qualified individuals with disabilities.

10 56. Union Pacific cannot show that such qualifications standards are job-related and
11 consistent with business necessity.

12 57. Because Union Pacific violated 42 U.S.C. § 12112, Zaragoza has suffered and will
13 continue to suffer loss of income, emotional distress, and other damages in an amount in excess of
14 \$75,000. Zaragoza is also entitled to attorneys’ fees and costs incurred in connection with these
15 claims.

16 58. Union Pacific committed the above-alleged acts with reckless disregard or
17 deliberate disregard for Zaragoza’s rights and safety. As a result, Zaragoza is entitled to punitive
18 damages.

19 **COUNT III**
20 ***VIOLATION OF THE ADA***
FAILURE TO ACCOMMODATE

21 59. Plaintiff incorporates the foregoing paragraphs by reference.

22 60. Zaragoza is a qualified individual with a disability within the meaning of the ADA.

23 61. Discriminating against a qualified individual with a disability includes “not making
24 reasonable accommodations to the known physical or mental limitations of the otherwise qualified
25 individual with a disability who is an applicant or employee, unless such covered entity can
26 demonstrate that the accommodation would impose an undue hardship on the operation of the
27 business of such covered entity[.]” 42 U.S.C. § 12112(b)(5)(A).

28 62. Union Pacific discriminated against Zaragoza by failing to provide Zaragoza with

1 reasonable accommodation.

2 63. Because Union Pacific violated 42 U.S.C. § 12112, Zaragoza has suffered and will
3 continue to suffer loss of income, emotional distress, and other damages in an amount in excess of
4 \$75,000. Zaragoza is also entitled to attorneys' fees and costs incurred in connection with these
5 claims.

6 64. Union Pacific committed the above-alleged acts with reckless disregard or
7 deliberate disregard for Zaragoza's rights and safety. As a result, Zaragoza is entitled to punitive
8 damages.

9 **PRAYER FOR RELIEF**

10 **WHEREFORE, Plaintiff prays for judgment against Union Pacific as follows:**

11 1. That the practices of Union Pacific complained of herein be determined and
12 adjudged to constitute violations of the ADA;

13 2. An injunction against Union Pacific and its directors, officers, owners, agents,
14 successors, employees and representatives, and any and all persons acting in concert with them,
15 from engaging in each of the unlawful practices, policies, customs, and usages set forth herein;

16 3. For an award of damages arising from loss of past and future income, emotional
17 distress, and other compensatory damages in excess of \$75,000.00;

18 4. Pre-judgment interest, as provided by law;

19 5. For Plaintiff's costs, disbursements and attorneys' fees pursuant to law;

20 6. For an award of punitive damages;

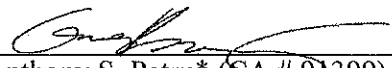
21 7. For all relief available under the ADA;

22 8. For such other and further relief available by statute; and

23 9. For such other and further relief as the Court deems just and equitable.

24 Date: November 10, 2021

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